



## **DEPARTMENT OF THE INTERIOR**

### **Fish and Wildlife Service**

#### **50 CFR Part 17**

**[Docket No. FWS-R4-ES-2012-0031; FWS-R4-ES-2013-0007]**

**[4500030113]**

**RIN 1018-AX73; 1018-AZ30**

### **Endangered and Threatened Wildlife and Plants; Proposed Endangered Status for the Neosho Mucket, Threatened Status for the Rabbitsfoot, and Designation of Critical Habitat for Both Species**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; reopening of comment period.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, announce the reopening of the public comment period on our October 16, 2012, proposed listing and designation of critical habitat for the Neosho mucket (*Lampsilis rafinesqueana*) and rabbitsfoot

(*Quadrula cylindrica cylindrica*) mussels under the Endangered Species Act of 1973, as amended (Act). We also announce the availability of a draft economic analysis (DEA) and draft environmental assessment of the proposed designation of critical habitat and an amended required determinations section of the proposal. We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the revised proposed rule, the associated DEA and draft environmental assessment, and the amended required determinations section. Comments previously submitted need not be resubmitted, as they will be fully considered in preparation of the final rules.

**DATES:** We will consider all comments received or postmarked on or before [INSERT DATE 30 DAYS AFTER DATE OF FEDERAL REGISTER PUBLICATION].

Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date.

**ADDRESSES:** *Document availability:* You may obtain a copy of the proposed rule on the Internet at <http://www.regulations.gov> at Docket No. FWS–R4–ES–2012–0031 or by mail from the Arkansas Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**). You may obtain a copy of the draft economic analysis and the draft environmental assessment at Docket No. FWS–R4–ES–2013–0007.

*Written comments:* You may submit written comments by one of the following methods:

- (1) *Electronically:* Go to the Federal eRulemaking Portal:

*http://www.regulations.gov*. Submit comments on the listing proposal to Docket No. FWS–R4–ES–2012–0031, and submit comments on the critical habitat proposal and associated draft economic analysis and draft environmental assessment to Docket No. FWS–R4–ES–2013–0007. See **SUPPLEMENTARY INFORMATION** for an explanation of the two dockets.

(2) *By hard copy*: Submit comments on the listing proposal by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R4–ES–2012–0031; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203. Submit comments on the critical habitat proposal, draft economic analysis, and draft environmental assessment by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R4–ES–2013–0007; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the **Public Comments** section below for more information).

**FOR FURTHER INFORMATION CONTACT:** Jim Boggs, Field Supervisor, U.S. Fish and Wildlife Service, Arkansas Ecological Services Field Office, 110 South Amity Road, Suite 300, Conway, AR 72032; by telephone 501-513-4475; or by facsimile 501-

513-4480. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339.

## **SUPPLEMENTARY INFORMATION:**

### **Public Comments**

We will accept written comments and information during this reopened comment period on our proposed listing determination and proposed critical habitat designation for the Neosho mucket (*Lampsilis rafinesqueana*) and rabbitsfoot (*Quadrula cylindrica cylindrica*) mussels that was published in the **Federal Register** on October 16, 2012 (77 FR 63440), our draft economic analysis (DEA) and draft environmental assessment of the proposed designation, and the amended required determinations provided in this document. We are also notifying the public that we will publish two separate rules for the final listing determination and the final critical habitat determination for the Neosho mucket and rabbitsfoot mussels. The final listing rule will publish under the existing Docket No. FWS-R4-ES-2012-0031 and the final critical habitat designation will publish under Docket No. FWS-R4-ES-2013-0007.

We request that you provide comments specifically on our listing determination under Docket No. FWS-R4-ES-2012-0031.

We request that you provide comments specifically on the critical habitat

determination and related draft economic analysis and draft environmental assessment under Docket No. FWS–R4–ES–2013–0007. We are particularly interested in comments concerning:

(1) The reasons why we should or should not designate habitat as “critical habitat” under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether there are threats to these species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat is not prudent.

(2) Specific information on:

(a) The amount and distribution of each species’ habitat;

(b) What areas occupied by the species at the time of listing that contain features essential for the conservation of these species we should include in the designation and why; and

(c) What areas not occupied at the time of listing are essential to the conservation of these species and why.

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(4) Any foreseeable economic, national security, or other relevant impacts that

may result from designating any area that may be included in the final designation. We are particularly interested in any impacts on small entities and the benefits of including or excluding areas from the proposed designation that are subject to these impacts.

(5) The projected and reasonably likely impacts of climate change on the critical habitat we are proposing.

(6) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments.

(7) Information on the extent to which the description of economic impacts in the DEA is complete and accurate.

(8) The likelihood of adverse social reactions to the designation of critical habitat, as discussed in the DEA and draft environmental assessment, and how the consequences of such reactions, if likely to occur, would relate to the conservation and regulatory benefits of the proposed critical habitat designation.

If you submitted comments or information on the proposed rule (77 FR 63440) during the initial comment period from October 16, 2012, to December 17, 2012, please do not resubmit them. We have incorporated them into the public record as part of the

comment period, and we will fully consider them in the preparation of our final determination. Our final determination concerning critical habitat will take into consideration all written comments and any additional information we receive during both comment periods. On the basis of public comments, we may, during the development of our final determination, find that areas proposed are not essential, are appropriate for exclusion under section 4(b)(2) of the Act, or are not appropriate for exclusion.

You may submit your comments and materials concerning the proposed rule, DEA, or draft environmental assessment by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information—will be posted on the website. We will post all hardcopy comments on <http://www.regulations.gov> as well. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing the proposed rule, draft economic analysis, and draft environmental assessment will be available for public inspection on <http://www.regulations.gov> at

Docket No. FWS–R4–ES–2012–0031 and Docket No. FWS–R4–ES–2013–0007, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Arkansas Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**). You may obtain copies of the proposed rule, the DEA, and the draft environmental assessment on the Internet at <http://www.regulations.gov> at Docket No. FWS–R4–ES–2012–0031 and Docket No. FWS–R4–ES–2013–0007, or by mail from the Arkansas Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

## **Background**

It is our intent to discuss only those topics directly relevant to the proposed designation of critical habitat for the Neosho mucket and rabbitsfoot in this document. For more information on the two mussels, their fish hosts, or their habitats, or more information than we provide below concerning previous Federal actions for these mussels, refer to the proposed listing determination and proposed designation of critical habitat published in the **Federal Register** on October 16, 2012 (77 FR 63440), which is available online at <http://www.regulations.gov> (at Docket No. FWS–R4–ES–2012–0031 or Docket No. FWS–R4–ES–2013–0007) or from the Arkansas Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

## *Previous Federal Actions*

On October 16, 2012, we published a proposed rule to list the Neosho mucket

(*Lampsilis rafinesqueana*) as an endangered species and the rabbitsfoot (*Quadrula cylindrica cylindrica*) mussel as a threatened species under the Act and to designate critical habitat for these two mussels (77 FR 63440). We proposed to designate approximately 779.1 river kilometers (rkm) (484.1 river miles (rmi)) of critical habitat for the Neosho mucket in the Cottonwood, Elk, Fall, Illinois, Neosho, Shoal, Spring, North Fork Spring, and Verdigris Rivers in Arkansas, Kansas, Missouri, and Oklahoma. The proposed critical habitat for the Neosho mucket is located in:

- Benton and Washington Counties, Arkansas;
- Allen, Chase, Cherokee, Coffey, Elk, Greenwood, Labette, Montgomery, Neosho, Wilson, and Woodson Counties, Kansas;
- Jasper, Lawrence, McDonald, and Newton Counties, Missouri; and
- Adair, Cherokee, and Delaware Counties, Oklahoma.

We proposed to designate 2,664 rkm (1,655 rmi) (as amended in this document; see **Changes from the Proposed Rule**, below) of critical habitat for the rabbitsfoot in the Neosho, Spring (Arkansas River system), Verdigris, Black, Buffalo, Little, Ouachita, Saline, Middle Fork Little Red, Spring (White River system), South Fork Spring, Strawberry, White, St. Francis, Big Sunflower, Big Black, Paint Rock, Duck, Tennessee, Red, Ohio, Allegheny, Green, Tippecanoe, Walhonding, Middle Branch North Fork Vermilion, and North Fork Vermilion Rivers and Bear, French, Muddy, Little Darby and Fish Creeks in Alabama, Arkansas, Kansas, Kentucky, Illinois, Indiana, Mississippi, Missouri, Ohio, Oklahoma, Pennsylvania, and Tennessee. The proposed critical habitat for the rabbitsfoot is located in:

- Colbert, Jackson, Madison, and Marshall Counties, Alabama;
- Arkansas, Ashley, Bradley, Clark, Cleveland, Dallas, Drew, Fulton, Grant, Hot Spring, Independence, Izard, Jackson, Lawrence, Little River, Marion, Monroe, Montgomery, Newton, Ouachita, Randolph, Saline, Searcy, Sevier, Sharp, Van Buren, White, and Woodruff Counties, Arkansas;
- Allen and Cherokee Counties, Kansas;
- Ballard, Green, Hart, Livingston, Logan, Marshall, and McCracken Counties, Kentucky;
- Massac, Pulaski, and Vermilion Counties, Illinois;
- Carroll, Pulaski, Tippecanoe, and White Counties, Indiana;
- Hinds, Sunflower, Tishomingo, and Warren Counties, Mississippi;
- Jasper, Madison, and Wayne Counties, Missouri;
- Coshocton, Madison, Union, and Williams Counties, Ohio;
- McCurtain and Rogers Counties, Oklahoma;
- Crawford, Erie, Mercer, and Venango Counties, Pennsylvania; and
- Hardin, Hickman, Marshall, Maury, and Robertson Counties, Tennessee.

That proposal had a 60-day comment period, ending December 17, 2012.

### *Critical Habitat*

Section 3 of the Act defines critical habitat as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation

of the species and that may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting critical habitat must consult with us on the effects of their proposed actions, under section 7(a)(2) of the Act.

### **Changes from the Proposed Rule**

We are changing the proposed rule of October 16, 2012 (77 FR 63440) to revise the total number of river kilometers (km) for the proposed designation of rabbitsfoot critical habitat. However, the beginning and ending points of the proposed critical habitat designation, as well as the unit descriptions (as described in the proposed critical habitat rule), remain the same.

The change in mapping was necessary due to an oversight in methods used for estimating the unit length in proposed critical habitat Unit RF7. The new methodology uses a better technique for following the curve and meander of the river channel, which results in an additional 1.4 river kilometers (rkm) (0.9 river mile (rmi)) of proposed critical habitat. An additional change in mapping, for Unit RF5, resulted from a mapping error. A short segment in the middle of Unit RF5 was not included; the addition of this segment added 0.8 rkm (0.5 rmi) to Unit RF5 and resulted in a corresponding increase to the private ownership river miles adjacent to Units RF5 and RF7.

The following table shows the revised number of river kilometers (rkm) and river miles (rmi) and ownership of adjacent riparian lands for the proposed designation of critical habitat for rabbitsfoot in Units RF5 and RF7. The data in this table replace the data provided in Table 5 of the proposed rule at 77 FR 63440 (October 16, 2012).

Critical habitat units	Federal rkm; rmi	State & local government rkm; rmi	Private rkm; rmi	Tribal* (subset of private) rkm; rmi
<b>Rabbitsfoot</b>				
Unit RF5: Saline River	0	22.3; 13.9	266.8; 165.8	0
Unit RF7: Middle Fork Little Red River	0	0	24.7; 15.4	0
Total rabbitsfoot	328.1; 203.9	137.9; 85.7	2,197.5; 1,365.3	86.9; 54.0
Total for both species	357.6; 222.2	147.7; 91.8	2,937.3; 1,825.3	189.9; 118.0

### **Consideration of Impacts Under Section 4(b)(2) of the Act**

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. We may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, provided such exclusion will not result in the extinction of the species.

When considering the benefits of inclusion for an area, we consider the additional regulatory benefits that an area would receive from consultation regarding adverse modification or destruction as a result of actions with a Federal nexus (activities conducted, funded, permitted, or authorized by Federal agencies), the educational benefits of mapping areas containing features that are essential to the recovery of the listed species, and any benefits that may result from designation due to State or Federal laws that may apply to critical habitat.

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan. In the case of these two mussels, the benefits of critical habitat include public awareness of the presence of the mussels and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for the two mussels due to protection from adverse modification or destruction of critical habitat. In practice, situations with a Federal nexus exist primarily on Federal lands or for projects undertaken, funded, or permitted by Federal agencies.

We have not proposed to exclude any areas from critical habitat. However, the final decision on whether to exclude any areas will be based on the best scientific and commercial data available at the time of the final designation, including information obtained during the comment period and information about the economic impact of the

designation. Accordingly, our DEA concerning the proposed critical habitat designation is available for review and comment (see **ADDRESSES**).

#### *Draft Economic Analysis*

The purpose of the DEA is to identify and analyze the potential economic impacts associated with the proposed critical habitat designation for the Neosho mucket and rabbitsfoot. The DEA separates conservation measures into two distinct categories according to “without critical habitat” and “with critical habitat” scenarios. The “without critical habitat” scenario represents the baseline for the analysis, considering protections otherwise afforded to the two mussels (e.g., under the Federal listing and other Federal, State, and local regulations). The “with critical habitat” scenario describes the incremental impacts specifically due to designation of critical habitat for these species. In other words, these incremental conservation measures and associated economic impacts would not occur but for the designation.

Most courts have held that the Service only needs to consider the incremental impacts imposed by the critical habitat designation over and above those impacts imposed as a result of listing the species. For example, the Ninth Circuit Court of Appeals reached this conclusion twice within the last few years, and the U.S. Supreme Court declined to hear any further appeal from those rulings. (See *Arizona Cattle Growers’ Assoc. v. Salazar*, 606 F.3d 116, (9<sup>th</sup> Cir. June 4, 2010) cert. denied, 179 L. Ed. 2d 300, 2011 U.S. LEXIS 1362, 79 U.S.L.W. 3475 (2011); *Home Builders Association of*

*Northern California v. United States Fish & Wildlife Service*, 616 F. 3<sup>rd</sup> 983 (9<sup>th</sup> Cir. 2010) cert. denied, 179 L. Ed. 2d 300, 2011 U.S. LEXIS 1362, 79 U.S.L.W. 3475 (2011).)

However, the prevailing court decisions in the Tenth Circuit Court of Appeals do not allow the incremental analysis approach. Instead, the Tenth Circuit requires that the Service consider both the baseline economic impacts imposed due to listing the species and the additional incremental economic impacts imposed by designating critical habitat. (See *New Mexico Cattle Growers Ass'n v. FWS*, 248 F.3d 1277 (10<sup>th</sup> Cir. May 11, 2001).) As a consequence, an economic analysis for critical habitat that is being proposed for designation within States that fall within the jurisdiction of the Tenth Circuit (as this designation does) should include a coextensive cost evaluation, which addresses, and quantifies to the extent feasible, all of the conservation-related impacts associated with the regulatory baseline (those resulting under the jeopardy standard under section 7 of the Act, and under sections 9 and 10 of the Act). In other words, the allocation of impacts should show those that are part of the regulatory baseline and those that are unique to the critical habitat designation.

Conservation measures implemented under the baseline (without critical habitat) scenario are described qualitatively within the DEA, but economic impacts associated with these measures are not quantified. Economic impacts are only quantified for conservation measures implemented specifically due to the designation of critical habitat

(i.e., incremental impacts). For a further description of the methodology of the analysis, see Chapter 2, “FRAMEWORK FOR THE ANALYSIS” of the DEA.

The DEA provides estimated costs of the foreseeable potential economic impacts of the proposed critical habitat designation for the two mussels over the next 20 years, which was determined to be the appropriate period for analysis because limited planning information is available for most activities to forecast activity levels for projects beyond a 20-year timeframe. It identifies potential incremental costs as a result of the proposed critical habitat designation; these are those costs attributed to critical habitat over and above those baseline costs attributed to listing. The DEA quantifies economic impacts of conservation efforts for the two mussels associated with the following categories of activity: (1) Water management; (2) timber management, agriculture, and grazing; (3) mining; (4) oil and gas development; (5) transportation (roads, highways, bridges) and utilities; (6) development; and (7) recreation.

The DEA concluded that the types of conservation efforts requested by the Service during section 7 consultation regarding the two mussels were not expected to change due to critical habitat designation. The Service believes that results of consultation under the adverse modification and jeopardy standards are likely to be similar because the ability of these species to exist is very closely tied to the quality of their habitats, and significant alterations of their occupied habitat that could result in adverse modification would also result in jeopardy to the species.

The DEA concludes that incremental impacts of critical habitat designation are limited to additional administrative costs of consultations and that indirect incremental impacts are unlikely to result from the designation of critical habitat for the two mussels. The present value of the total direct (administrative) incremental cost of critical habitat designation is \$4,400,000 over the next 20 years assuming a 7 percent discount rate, or \$290,000 on an annualized basis. Transportation and utility activities are likely to be subject to the greatest incremental impacts at \$1,400,000 over the next 20 years, followed by timber, agriculture, and grazing at \$960,000; development at \$760,000; other (animal and biological control, prescribed burns, land clearing, bank stabilization, habitat or shoreline restoration) at \$530,000; oil and gas development at \$320,000; water flow management at \$190,000; water quality management at \$120,000; and mining at \$71,000.

As we stated earlier, we are soliciting data and comments from the public on the DEA, as well as all aspects of the proposed rule and our amended required determinations. We may revise the proposed rule or supporting documents to incorporate or address information we receive during the public comment period. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this species.

The purpose of an environmental assessment is to identify and disclose the environmental consequences associated with the proposed critical habitat designation for the Neosho mucket and rabbitsfoot in compliance with the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*). We evaluated a variety of issues related to the human environment that could potentially be affected by the designation of critical habitat for the two mussels, including conservation of the Neosho mucket and rabbitsfoot, water resources, energy development and production, socioeconomic conditions and environmental justice, and cumulative effects. Our draft environmental assessment concerning the proposed critical habitat designation is available for review and comment (see **ADDRESSES**).

#### **Required Determinations—Amended**

In our October 12, 2011, proposed rule (76 FR 63360), we indicated that we would defer our determination of compliance with several statutes and executive orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders became available in the DEA. We have now made use of the DEA data to make these determinations. In this document, we affirm the information in our proposed rule concerning Executive Orders (E.O.s) 12866 and 13563 (Regulatory Planning and Review), E.O. 13132 (Federalism), E.O. 12988 (Civil Justice Reform), E.O. 13211 (Energy, Supply, Distribution, and Use), the

Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), and the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). However, based on the DEA data, we are amending our required determinations concerning the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), E.O. 12630 (Takings), the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), and the President’s memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments” (59 FR 22951).

*Regulatory Flexibility Act (5 U.S.C. 601 et seq.)*

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. Based on our DEA of the proposed designation, we provide our analysis for determining whether the proposed rule would result in a significant economic impact on a substantial number of small entities. Based on comments we receive, we may revise this determination as part of our final

rulemaking.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term “significant economic impact” is meant to apply to a typical small business firm’s business operations.

To determine if the proposed designation of critical habitat for the two mussels would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities, such as water management, timber management, agriculture and grazing, mining, oil and gas development, transportation and utilities, and development and recreation. In order to

determine whether it is appropriate for our agency to certify that the proposed rule would not have a significant economic impact on a substantial number of small entities, we considered each industry or category individually. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement. Critical habitat designation will not affect activities that do not have any Federal involvement; designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. If we finalize the proposed listing for these species, in the areas where they are present Federal agencies will already be required to consult with us under section 7 of the Act on activities they fund, permit, or implement that may affect the species. If we finalize this proposed critical habitat designation, consultations to avoid the destruction or adverse modification of critical habitat will be incorporated into the existing consultation process.

In the DEA, we evaluated the potential economic effects on small entities resulting from implementation of conservation actions related to the proposed designation of critical habitat for the two mussels. We anticipate that 11 small entities could be affected by water flow management consultations in a single year at a cost of \$410 each, representing less than 0.007 percent of annual revenues. Eleven small entities could be affected by water quality management consultations within a single year at a cost of \$340 each, representing less than 1 percent of annual revenues. Forty-one small entities could be affected by timber, agriculture, and grazing consultations within a single year, at a cost of \$470, representing less than 0.028 percent of annual revenues. Four small entities

could be affected by mining consultations within a single year, at a cost of \$430, representing less than 0.005 percent of annual revenues. Fourteen small entities could be affected by oil and gas development consultations within a single year, at a cost of \$460, representing less than 0.006 percent of annual revenues. Forty-three small entities could be affected by development and recreation consultations within a single year, at a cost of \$410, representing less than 0.007 percent of annual revenues. Sixty-eight small entities could be affected by transportation and utility consultations within a single year, at a cost of \$450, representing 0.005 percent of annual revenues. Thirty-five small entities could be affected by other consultations within a single year, at a cost of \$400, representing 0.005 percent of annual revenues. Please refer to the DEA of the proposed critical habitat designation for a more detailed discussion of potential economic impacts.

The Service's current understanding of recent case law is that Federal agencies are only required to evaluate the potential impacts of rulemaking on those entities directly regulated by the rulemaking; therefore, they are not required to evaluate the potential impacts to those entities not directly regulated. The designation of critical habitat for an endangered or threatened species only has a regulatory effect where a Federal action agency is involved in a particular action that may affect the designated critical habitat. Under these circumstances, only the Federal action agency is directly regulated by the designation, and, therefore, consistent with the Service's current interpretation of RFA and recent case law, the Service may limit its evaluation of the potential impacts to those identified for Federal action agencies. Under this interpretation, there is no requirement

under the RFA to evaluate potential impacts to entities not directly regulated, such as small businesses. However, Executive Orders 12866 and 13563 direct Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consequently, it is the current practice of the Service to assess to the extent practicable these potential impacts, if sufficient data are available, whether or not this analysis is believed by the Service to be strictly required by the RFA. In other words, while the effects analysis required under the RFA is limited to entities directly regulated by the rulemaking, the effects analysis under the Act, consistent with the E.O. regulatory analysis requirements, can take into consideration impacts to both directly and indirectly impacted entities, where practicable and reasonable.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. Information for this analysis was gathered from the Small Business Administration, stakeholders, and the Service. We have identified 227 small entities that may be impacted by the proposed critical habitat designation in a single year. For the above reasons and based on currently available information, we certify that, if promulgated, the proposed critical habitat designation would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

*National Environmental Policy Act (42 U.S.C. 4321 et seq.)*

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the

Tenth Circuit, we do not need to prepare environmental analyses as defined by NEPA (42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)). However, when the range of the species includes States within the Tenth Circuit, as is the case with the Neosho mucket and rabbitsfoot, under the Tenth Circuit ruling in *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), we will undertake a NEPA analysis for critical habitat designation. Accordingly, we have completed a draft environmental assessment to identify and disclose the environmental consequences resulting from the proposed designation of critical habitat for the Neosho mucket and rabbitsfoot. Our preliminary determination is that the designation of critical habitat for the Neosho mucket and rabbitsfoot would not have direct impacts on the environment. However, we will further evaluate this issue as we complete our final environmental assessment.

#### *E.O. 12630 (Takings)*

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the Neosho mucket and rabbitsfoot in a takings implications assessment. As discussed above, the designation of critical habitat affects only Federal actions. Although private parties that receive Federal

funding, assistance, or require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. The DEA found that no significant economic impacts are likely to result from the designation of critical habitat for the Neosho mucket and rabbitsfoot. Because the Act's critical habitat protection requirements apply only to Federal agency actions, few conflicts between critical habitat and private property rights should result from this designation. Based on information contained in the DEA and described within this document, it is not likely that economic impacts to a property owner would be of a sufficient magnitude to support a takings action. Therefore, the takings implications assessment concludes that this designation of critical habitat for the Neosho mucket and rabbitsfoot does not pose significant takings implications for lands within or affected by the designation.

#### *Government-to-Government Relationship with Tribes*

Potentially affected Tribes include: the Osage Nation, Cherokee Nation, United Keetowah Band of Cherokee Indians, Choctaw Nation, Delaware Tribe of Indians, and Peoria Tribe. On April 19, 2011, we notified the United Keetowah Band of Cherokee Indians and Delaware Tribe of Indians via e-mail regarding tribal lands potentially affected by our proposal to list Neosho mucket and rabbitsfoot and to designate critical habitat for each species. The Peoria Tribe and Osage Nation also were notified via e-mail on February 15, 2011, and we then followed up with subsequent e-mail correspondence.

The Cherokee Nation and Choctaw Nation were notified via e-mail on April 20 and 21, 2011, respectively, via e-mail and telephone. Lands proposed to be designated as critical habitat do not represent riparian land ownership by any Tribe, represent only tribal jurisdictional areas, are not managed by any Tribe, and are on otherwise privately owned lands. We considered the Tribes' comments, which were limited to providing tribal land and jurisdictional area maps and biological data for the two mussels, during preparation of the proposed rule.

## **Authors**

The primary authors of this notice are the staff members of the Arkansas Ecological Services Field Office and the Southeast Region, U.S. Fish and Wildlife Service (see **ADDRESSES**).

**Authority**

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Date: May 1, 2013

Rachel Jacobson

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks

**Billing Code 4310–55–P**

